LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAY 29 1964
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 129

ROBERT LAKEN,

Petitioner,

vs.

JOAN CORNMESSER,

Respondent.

Petition For Writ Of Certiorari To The Appellate Court Of Illinois, Second District.

JOHN R. SNIVELY,
401 West State Street,
Rockford, Illinois,
Counsel for Petitioner.

Midwest Law Printing Co., 326 N. Michigan Ave., Chicago
Telephone Financial 6-3988

INDEX

	PAGE
Citation to Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statute Involved	2
Statement of the Case	3
Facts	7
Reasons for Granting the Writ	10
Conclusion	24
Appendix A, Statute	1a
B, Opinion	11a

CITATIONS.

Cases:

Beadle County Nat. Bank v. Hyman, 33 Ill. App. 618	15
Chicago & A. R. Co. v. Eselin, 86 Ill. App. 94	15
Di Bella v. Cuccio, 15 Ill. [illegible] 580	15
Ford v. Narup, 38 Ill. App. [illegible]d 245	22
Gustafson v. Consumer Sales Agency, 414 Ill. 235	15
Hodorowicz v. Szule, 16 Ill. App. 887	15
Lasko v. Meier, 394 Ill. 71	15
McFarland v. People, 72 Ill. 368	21
Mowery v. Karas, 35 Ill. App. 2d 406	23
Oulvey v. Converse, 326 Ill. 226	15
Owens-Illinois Glass Co. v. McKibbin, 385 Ill. 245	15
People v. Shoffner, 400 Ill. 174	16
People ex rel. Barrett v. Anders, 173 Ill. App. 561	14
People ex rel. Wilson v. Cutler, 200 Ill. App. 469	21
People ex rel. Kominsky v. Engert, 202 Ill. App. 299	22

People ex rel. Murphy v. Frowley, 185 Ill. App. 338 .. 22
People ex rel. Jorczik v. Garmes, 198 Ill. App. 435 .. 22
People ex rel. Collins v. Matt, 224 Ill. App. 210 21
People ex rel. O'Connell v. Nason, 161 Ill. App. 29 22
People ex rel Zimmerman v. Rhoede, 198 Ill. App. 537 22
Volluz v. East St. Louis Light & Power Co., 210 Ill. App. 565 15
Wagner v. Kepler, 411 Ill. 371 15
Wheeler v. City of Chicago, 24 Ill. 105 18
Wilson v. Baillargeon Interior Bldg., 54 Ill. App. 250 15

Constitutions:

14th Amendment to Constitution of the United States 10
Const. of Ill., Art. II, Secs. 2, 12 10

Statutes:

Ill. Rev. Stat. 1959, Chap. 38, Par. 731 16
Ill. Rev. Stat. 1959, Chap. 106¾, Par. 51 14
Ill. Rev. Stat. 1959, Chap. 106¾, Par. 52 12
Ill. Rev. Stat. 1959, Chap. 106¾, Par. 53 13
Ill. Rev. Stat. 1959, Chap. 106¾, Par. 55 17
Ill. Rev. Stat. 1959, Chap. 106¾, Par. 56 17
Ill. Rev. Stat. 1959, Chap. 106¾, Par. 59 ..... 20, 23
Ill. Rev. Stat. 1959, Chap. 106¾, Par. 63 16
Ill. Rev. Stat. 1959, Chap. 110, Par. 33 (1) 13
Ill. Rev. Stat. 1959, Chap. 110, Par. 34 13
Ill. Rev. Stat. 1961, Chap. 110, Par. 42 (3) 14
Ill. Rev. Stat. 1961, Chap. 110, Par. 46 (1) 15
Ill. Rev. Stat. 1961, Chap. 110, Par. 46 (3) 19
Ill. Rev. Stat. 1961, Chap. 110, Par. 55 16
Ill. Rev. Stat. 1961, Chap. 110, Par. 56 17
Ill. Rev. Stat. 1961, Chap. 110, Par. 63 18
Ill. Rev. Stat. 1961, Chap. 110, Par. 68 (2) 20

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No.

ROBERT LAKEN,

Petitioner,

vs.

JOAN CORNMESSER,

Respondent.

Petition For Writ Of Certiorari To The Appellate Court Of Illinois, Second District.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Robert Laken, prays that a writ of certiorari issue to review a judgment of the Appellate Court of Illinois, Second District, affirming a judgment of the County Court of Winnebago County in a paternity proceeding.

Citation To Opinion Below.

The opinion of the Appellate Court, set forth in Appendix B hereto, infra, page 11a, is reported in 43 Ill. App. 2d 324, 193 N.E. 2d 337.

Jurisdiction.

The judgment of the County Court of Winnebago County was affirmed on October 14, 1963. A timely petition for rehearing filed on October 29, 1963, was denied on November 5, 1963. A timely petition for leave to appeal from the Appellate Court to the Supreme Court of Illinois was filed on December 12, 1963. It was denied on January 21, 1964. A timely motion for reconsideration filed on February 3, 1964, was denied on March 10, 1964

The jurisdiction of this court is invoked under 28 U. S. C. Sec. 1257 (3) because the validity of a State statute was drawn in question on the ground of its being repugnant to the Constitution of the United States, and a right was specially set up and claimed under the Constitution of the United States.

Questions Presented.

Whether the State statute deprived the petitioner of his liberty and property without due process of law and denied him the equal protection of the laws in violation of the 14th Amendment to the Constitution of the United States.

Whether the State deprived the petitioner of his liberty and property without due process of law and denied him the equal protection of the laws in violation of the 14th Amendment to the Constitution of the United States because he did not have a fair trial by an impartial jury.

Statute Involved.

The Illinois Paternity Act is printed in Appendix A hereto, infra, page 1a.

Statement Of The Case.

This is a paternity proceeding.

The action was instituted by Joan Cornmesser, plaintiff, against Robert Laken, defendant, on January 3, 1961, in the County Court of Winnebago County, it is believed, to establish the paternity of a child, which, if born alive, may be born out of wedlock, but it is alleged merely to enforce liability for its support, maintenance, education and welfare, and for her expenses during the period of her pregnancy, confinement and recovery.

The complaint is, as follows:

Now comes the plaintiff, Joan Cornmesser, by Assistant State's Attorney, David L. Martenson, in and for the County of Winnebago, State of Illinois and says:

1. That the said Plaintiff is now pregnant with a child in the County of Winnebago, State of Illinois, which, if born alive, may be deemed by law "a child born out of wedlock" and that the said child was fathered by the Defendant, Robert Laken, a resident of or who may be found in the County of Winnebago, State of Illinois.

2. That by reason of said pregnancy, confinement and recovery, various sums of money will be expended by the Plaintiff and in her behalf.

3. That if said child is born alive, various sums of money will be expended for the said child's support, maintenance, education and welfare by the Plaintiff and in behalf of the said child.

4. That the said Plaintiff has made a demand upon the said Defendant to pay for her expenses incurred by said pregnancy, confinement and recovery and for the said child's

support, maintenance, education and welfare, all of which the said Defendant has refused to do.

Wherefore, Plaintiff prays:

1. That the said Plaintiff be appointed guardian of said child and be awarded the care, custody and control of said child.

2. That the said Defendant be ordered and decreed to pay sufficient sums of money for the Plaintiff's expenses incurred by her pregnancy, confinement and recovery and for the said child's support, maintenance, education and welfare.

3. That this Honorable Court issue forthwith a warrant for the arrest of the Defendant, Robert Laken, without notice and without bond, as provided in the Statute laws of the State of Illinois to bring the accused before the Court to answer this Complaint.

Joan Corninesser
Plaintiff

(Verification)

Upon the filing of the complaint, the trial court authorized the sheriff to take into custody and bring the defendant before the court forthwith. The clerk issued a warrant for the apprehension of the defendant. He was arrested on May 23, 1961.

The defendant appeared before the court on June 22, 1961. He was furnished with a copy of the complaint. The record shows that he then entered a plea of not guilty. The trial court did not examine the plaintiff, upon oath or affirmation, and in his presence, on the charge that he is the father of the child as provided by the Paternity Act. His bond was fixed at $500.00, which he furnished.

He did not file an answer to the complaint, nor was he required by the trial court to do so.

He filed a demand for a trial by jury on June 22, 1961.

The case was called for trial on September 27, 1961. The trial court, however, did not cause an issue to be made up whether he is the father of the child as provided by the Paternity Act.

The plaintiff introduced evidence in support of the allegations of the complaint. In the order named, Joan Cornmesser, Sherman McCullough, Bryan Johnson, Helen Bogren, Hazel Davis, and Dr. Richard Runstrom, testified. The defendant was called as an adverse witness under Section 60 of the Civil Practice Act, but he did not testify.

The defendant introduced evidence in defense. In the order named, Robert Laken, Roy Ippen, George T. Laken, Randolph L. Cornmesser, and Leland Nelson, testified.

The plaintiff introduced evidence in rebuttal. In the order named, Joan Cornmesser and Helen Bogren, testified.

The case was submitted to the jury on September 28, 1961.

The verdict returned by it is as follows:

We, the Jury, find the defendant, Robert Laken, is the real father of said child born out of wedlock of the said Joan Cornmesser, an unmarried woman.

A motion in arrest of judgment, judgment notwithstanding the verdict, and a new trial, was heard and denied on October 11, 1961.

The trial court did not enter judgment on the verdict.

An order for support was entered on October 26, 1961, but it was not signed until December 21, 1961. The defendant was ordered to pay $12.50 for the child.

The defendant filed a motion to vacate the purported judgment on the verdict, and the order of support, on November 24, 1961. In it he raised, among other things, the constitutionality of the Paternity Act. The trial court ruled upon the constitutionality of the statute and other points raised. It held the statute constitutional and valid. The motion was denied on February 24, 1962.

The plaintiff then filed a petition for citation for contempt on February 26, 1962. A motion to dismiss was filed by the defendant on March 13, 1962. An order was entered on April 17, 1962, dismissing the petition.

A notice of appeal was filed by the defendant on April 17, 1962, together with proof of service.

From the purported judgment on the verdict, and the order of support, and the order denying the motion to vacate, the defendant appealed to the Supreme Court of Illinois.

The case was transferred without opinion to the Appellate Court of Illinois, Second District, on January 28, 1963. The judgment of the County Court of Winnebago County was affirmed on October 14, 1963. A rehearing was denied on November 5, 1963.

The defendant made application for leave to appeal from the Appellate Court to the Supreme Court of Illinois. His petition filed on December 12, 1963, was denied on January 21, 1964. A motion for reconsideration filed on February 5, 1964, was denied on March 10, 1964.

Facts.

Joan Cornmesser, age 25, testified that she was married to Randolph L. Cornmesser in 1954 and divorced in 1959. (Abst. 18.) He obtained a divorce on August 29, 1959. (Abst. 39.) She was then married to George Maurici on October 31, 1959. (Abst. 21.) She obtained a divorce on April 1, 1960. (Abst. 23.) She had a daughter, Deborah Cornmesser, age 6. (Abst. 21.)

She had been acquainted with Robert Laken since she was 14. (Abst. 17.) She had her first date with him the first week in April 1960. She went on dates with him several times a week.

She had a date with him on May 22, 1960. (Abst. 17.) He came to her apartment. She had intercourse with him. (Abst. 18.) The police came. They were arrested on a warrant for disorderly conduct. The case was later dismissed. (Abst. 32.)

This was not the first time she had intercourse with him. (Abst. 18.) She thought it was the last week in April. She had a date with him on May 2, 1960. She told him that she was pregnant.

She had her menstrual period on May 8, 1960. (Abst. 18.) It lasted five days. She had intercourse with him after this period. She first believed that she was pregnant in June, the second or third week. She continued to date him after she found she was pregnant. Her last date was the end of June.

She had an examination made by Dr. Richard Runstrom on June 20, 1960, to determine if she was pregnant. (Abst. 29.) It was inconclusive. He attended her and delivered a baby on March 4, 1961. (Abst. 30.) It weighed 8 lbs. 6 oz. In his

opinion it was a full term baby. From his examination he could not determine the approximate date of conception.

Her child, Daniel Richard Cornmesser, was born on March 4, 1961. (Abst. 17.) She believed that Robert Laken was the father of the child. (Abst. 19.)

Robert Laken testified that he met Joan Cormesser at a tavern on February 15, 1960. (Abst. 31.) He met her again the first week in March. He arranged for a date with her on Saturday night. He drove to the New Mill Motel, but he did not stay there. Her husband had followed them. He learned that she was married to him. He then drove her home and left.

He met her again at a tavern the first week in April. (Abst. 31.) He took her home. He stayed in her apartment all night. He continued to date her in April. He began to see her with other fellows. (Abst. 34.) He then told her he didn't believe that he wanted to date her any more. (Abst. 32.)

He had a date with another girl on May 22, 1960. (Abst. 32.) Joan Cornmesser called him. She wanted to talk with him. At her request he broke his date with the other girl and went over. He watched television. He did not have intercourse with her. The police arrested them. They were taken to the station and released on bond.

He admitted that he had intercourse with her between the first and last of April 1960. (Abst. 32.) It stopped at that time. He has taken her home after that but he never had intercourse with her. (Abst. 34.) He didn't want to get involved with her any more. (Abst. 35.)

She had testified that she spent three or four nights with him at the Laken home. (Abst. 23.) His parents were away. (Abst. 17.) It was on Saturday the last two weeks in May

and the first two in June. However, he denied that she had ever spent a night there. (Abst. 35, 36.) His father, George T. Laken, also testified that she did not spend a night at his home during that period. (Abst. 37.)

Roy Ippen, agent for Skelly Oil Company, and Leland Nelson, owner of Universal Pattern Works, testified to his good character. (Abst. 36, 39.)

Reasons For Granting The Writ.

1. The Paternity Act is unconstitutional.

The Constitution of the State of Illinois provides that no person shall be deprived of life, liberty or property, without due process of law. (Const. of Ill., Art. II, Sec. 2.)

The 14th Amendment to the Constitution of the United States has a similar provision. It provides that no state shall deprive any person of life, liberty or property, without due process of law, nor deny the equal protection of the laws.

The Constitution of the State of Illinois also provides that no person shall be imprisoned for debt, unless upon refusal to deliver up his estate for the benefit of his creditors in such manner as shall be prescribed by law. (Const. of Ill., Art. II, Sec. 12.)

The Paternity Act, approved July 5, 1957, violates the due process and equal protection clauses of the 14th Amendment to the Constitution of the United States and Sections 2 and 12 of Article II of the Constitution of the State of Illinois.

The provisions of the Act relating to the issuance of a warrant, arrest, bond, imprisonment for neglect to give bond and security, contempt of court and imprisonment for contempt are incidents of a criminal prosecution.

First, the Act authorizes the issuance of a warrant for the apprehension of the defendant, which warrant shall be directed to all sheriffs, coroners, constables and other police officers in the State.

Second, it provides that the warrant may be served by any such officer in any county. However, it does not re-

quire such officer forthwith to take the accused and bring him before the court.

Third, the accused is then imprisoned in jail. He is denied bail until his appearance before the court for the examination of the woman. He is deprived of his liberty without due process of law.

Fourth, he is imprisoned for neglect to give bond and security. The bond shall be payable to the People of the State of Illinois.

Fifth, it authorizes a proceeding for contempt of court and imprisonment for such contempt. The County Court lacks jurisdiction to punish a defendant for contempt of court.

In Illinois, it is well settled that a paternity proceeding is a civil action and not a criminal prosecution, and is purely statutory, but the proceeding violates the constitutional rights of the accused. In some states it is a criminal prosecution.

The word, debt, in the Constitution of the State of Illinois can not be construed to include damages for torts or fines or penalties arising from a violation of the penal laws of the state. The entire section clearly indicates that reference was had to debts arising ex contractu, express or implied. "No person shall be imprisoned for debt, unless upon refusal to deliver up his estate for the benefit of his creditors in such manner as prescribed by law." As to the debts intended to be embraced, there must be a relation of debtor and creditor. Such relation exists between the reputed father of a child born out of wedlock and the mother. She seeks to establish the paternity of a child born out of wedlock and establish and enforce liability for its support, maintenance, education and welfare. It has been repeatedly held by this

court that any liability to pay money arising out of a contract, express or implied, constitutes a debt within the meaning of the Constitution. The liability of the father of a child born out of wedlock for its support, maintenance, education and welfare, and for the reasonable expenses of the mother during the period of her pregnancy, confinement and recovery arises out of an implied contract with her to support the child. The amount of support and confinement expenses constitute a debt, and the Constitution declares that no person shall be imprisoned for a debt. A statute which authorizes imprisonment of an accused in such cases is in conflict with the provision of the Constitution which abolished imprisonment for debt.

The Paternity Act is repugnant to the Constitution of the United States. It should be so declared by the court.

2. The complaint is fatally defective.

A paternity proceeding is an action to establish the paternity of a child born out of wedlock and to establish and enforce liability for its support, maintenance, education and welfare. (Ill. Rev. Stat. 1959, Chap. 106¾, Sec. 1 et seq.)

The father of a child born out of wedlock whose paternity is established in a proceeding shall be liable for its support, maintenance, education and welfare, until the child's attainment of age 18 or until the child is legally adopted, to the same extent and in the same manner as the father of a child born in lawful wedlock is liable for its support, maintenance, education and welfare. (Ill. Rev. Stat. 1959, Chap. 106¾, Par. 52.)

The mother of a child born out of wedlock shall also be liable for its support, maintenance, education and welfare to the same extent as if the child had been born in lawful wedlock.

A father whose paternity is so established shall also be liable for the reasonable expenses of the mother during the period of her pregnancy, confinement and recovery, which liability may be determined and enforced in the proceeding in which paternity is established or in any subsequent proceeding to enforce liability for the support, maintenance, education and welfare. (Ill. Rev. Stat. 1959, Chap. 106¾, Par. 53.)

Such action may be instituted only on the filing of a complaint in writing by the mother of a child born out of wedlock, or by a woman who is pregnant with child, which, if born alive, may be born out of wedlock, accusing, under oath or affirmation, a person with being the father of such child. (Ill. Rev. Stat. 1959, Chap. 106¾, Par. 54.) The action may be filed in the county where the complainant may be so pregnant or delivered, or where the person accused may reside or be found.

The Civil Practice Act provides that all pleadings shall contain a plain and concise statement of the pleader's cause of action, counterclaim defense or reply. (Ill. Rev. Stat. 1959, Chap. 110, Par. 33 (1).) It also provides that every complaint and counterclaim shall contain specific prayers for the relief to which the pleader deems himself entitled. (Ill. Rev. Stat. 1959, Chap. 110, Par. 34.)

Here, the complaint states, among other things, that "the said plaintiff is now pregnant with a child in the County of Winnebago, State of Illinois, which, if born alive, may be deemed by law 'a child born out of wedlock' and that the said child was fathered by the Defendant, Robert Laken, a resident of or who may be found in the County of Winnebago, State of Illinois."

In the prayer for relief the plaintiff prays that the said plaintiff be appointed guardian of said child and be

awarded the care, custody and control of said child, that said defendant be ordered and decreed to pay sufficient sums of money for the plaintiff's expenses incurred by her pregnancy, confinement and recovery and for the said child's support, maintenance, education and welfare, and that the court forthwith issue a warrant for the arrest of the defendant, without notice and without bond, as provided in the statute to bring the accused before the court to answer the complaint.

When a proceeding is instituted before the birth of a child, it is necessary that the plaintiff file an amended or supplemental complaint after the child is born.

Leave should have been obtained from the trial court to so file an amended or supplemental complaint before trial. (*People ex rel. Barrett* v. *Anders*, 173 Ill. App. 561.) It should state that the plaintiff was delivered of a male child, Daniel Richard Cornmesser, born out of wedlock on March 4, 1961, at Rockford, Illinois, and he is living. It should also state that the defendant is the father of the child. It should also state that the parties were not married to each other at the time of its birth. (Ill. Rev. Stat. 1959, Chap. 106¾, Par. 51.)

On the death of the child at birth, the cause of action abates. If the child dies after birth, an action to establish the paternity of the child also abates.

In addition to amendment before trial, the complaint could have been amended during the trial in the discretion of the trial court. It could also have been amended at any time before final judgment. (Ill. Rev. Stat. 1961, Chap. 110, Par. 46 (1).)

The Civil Practice Act provides that all defects in pleadings, either in form or substance, not objected to in the

trial court are waived. (Ill. Rev. Stat. 1961, Chap. 110, Par. 42 (3).)

Here, objection was made to the sufficiency of the complaint in the trial court. It was made after verdict but before judgment. The objections to the complaint were not waived by proceeding to trial without objection, or cured by verdict, as stated in the opinion of the Appellate Court. If there is a failure of the complaint to state a cause of action, or to contain a specific prayer for relief, as in this case, its insufficiency can be raised at any time. (*Gustafson* v. *Consumer Sales Agency*, 414 Ill. 235, *Wagner* v. *Kepler*, 411 Ill 371, *Lasko* v. *Meier*, 394 Ill. 71, *Owens-Illinois Glass Co.* v. *McKibbin*, 385 Ill. 245, *Oulvey* v. *Converse*, 326 Ill. 226, *Hodorowicz* v. *Szulc*, 16 Ill. App. 887, *Volluz* v. *East St. Louis Light & Power Co.*, 210 Ill. App. 565, *Chicago & A. R. Co.* v. *Eselin*, 86 Ill. App. 94, *Wilson* v. *Baillargeon Interior Bldg. Co.*, 54 Ill. App. 250, *Beadle County Nat. Bank* v. *Hyman*, 33 Ill. App. 618.)

When a complaint fails to state a cause of action, it is not cured by verdict. Clearly, the complaint is fatally defective. It does not state the facts that are necessary to the cause of action. It also does not contain a specific prayer that the paternity of the child may be established. This is absolutely necessary in a paternity proceeding.

The complaint is the most defective that appears in the decisions in this state. The pleader should have followed the complaint in *Di Bella* v. *Cuccio*, 15 Ill. 2d 580.

The judgment, if there was one, should have been arrested by the trial court, but it failed to grant the motion to do so. Consequently, the trial court erred. It is reversible error.

3. The practice and procedure must be in accordance with the provisions of the statute relative thereto.

In a criminal prosecution, a plea of not guilty is indispensable to a valid trial. The plea constitutes the issue between the State and the prisoner. (Ill. Rev. Stat. 1959, Chap. 38, Par. 731.) In the absence of a plea, no issue is raised. (*People* v. *Shoffner*, 400 Ill. 174.)

In a civil action, the entry and acceptance of a plea of not guilty is not proper. The Paternity Act provides that the provisions of the Civil Practice Act and the rules adopted pursuant to the Act shall apply to all proceedings thereunder, except as otherwise specifically provided in the Act. (Ill. Rev. Stat. 1959, Chap. 106¾, Par. 63.)

Here, to the complaint, the defendant entered a plea of not guilty. It does not form a proper issue. The trial court should not have accepted the plea. It should have required the defendant to file an answer or otherwise file his appearance, as provided by the Civil Practice Act and the rules.

The Paternity Act, in part, provides:

> "Upon the appearance of the accused and in his presence, the court shall examine the woman, upon oath or affirmation, on the charge that he is the father of the child. The accused shall have the right to controvert the charge, and evidence may be heard as in other cases within the jurisdiction of the court. * * * if after the accused has controverted the charge the court, upon examination determines that sufficient cause appears, it shall bind the accused person, in bond, with sufficient security, to appear in court on a designated return day occurring within 30 days from the date of the bond, or as soon thereafter as the court is in session and from day to day after the time so designated, until the final order or judgment of the court, to answer the charge and to abide the final order or judgment and not to

depart without leave, to which court the bond shall be returned. In neglect or refusal to give bond and security, the court shall commit the accused to the county jail, there to be held to answer the complaint." • • •

Ill. Rev. Stat. 1959, Chap. 106¾, Par. 55.

The record discloses that the trial court did not follow the practice and procedure set forth in the statute.

First, the trial court did not examine the woman, on oath or affirmation, and in the presence of the accused, on the charge that he is the father of the child.

Second, the accused did not have an opportunity to controvert the charge.

Third, evidence was not heard by the court.

Fourth, it did not bind the accused person, in bond, with sufficient security, to appear in court on a designated return day occurring within 30 days from the date of the bond.

The practice and procedure was unauthorized and improper in this case. The defendant was deprived of his liberty and property without due process of law in violation of the Constitutions of the United States and of the State of Illinois. He was also denied the equal protection of the laws.

4. The trial court did not cause an issue to be made up whether the defendant is the father of the child.

The Paternity Act, in part, provides:

"At the time appointed for appearance and answer, the court shall cause an issue to be made up whether the person charged is the father of the child, which issue, upon demand of either the mother or the accused person, shall be tried by a jury." • • •

Ill. Rev. Stat. 1959, Chap. 106¾, Par. 56.

It became and was the duty of the trial court to cause such issue to be made up. The word, shall, is mandatory. Here, an advantage is lost, a right is destroyed, a benefit is sacrificed. Where a right or benefit to any person depends upon the imperative use of the word, it is mandatory. (*Wheeler* v. *City of Chicago*, 24 Ill. 105.)

In equity cases, the trial court has a similar duty, but it is discretionary. The Civil Practice Act provides that the court may in its discretion direct an issue or issues to be tried by a jury, whenever it is judged necessary in any case in equity pending therein. (Ill. Rev. Stat. 1961, Chap. 110, Par. 63.)

The instruction set forth in the opinion of the Appellate Court does not meet the statutory requirement. It may inform the jury, but it is not proper in form or substance. The usual form of submitting an issue to be tried by a jury is in the form of a question made up by the trial court, framed so as to require merely an affirmative or negative answer.

Here, the defendant filed a demand for a trial by jury in apt time. He had a right to have the issue tried by a jury. The trial court, however, did not cause such issue to be made up, nor did it submit any to the jury. The statute is mandatory.

It is reversible error.

5. There is a fatal variance between the allegations of the complaint and the proof.

It is well settled that the evidence must conform to the allegations of the complaint, and the judgment or decree to both.

The Civil Practice Act, in part, provides:

> **"A pleading may be amended at any time, before or after judgment, to conform the pleadings to the proofs, upon terms as to costs and continuance that may be just."**
>
> Ill. Rev. Stat. 1961, Chap. 110, Par. 46 (3).

Here, the complaint states, among other things, that "the said plaintiff is now pregnant with a child in the County of Winnebago, State of Illinois, which, if born alive, may be deemed by law 'a child born out of wedlock'."

The proof is that the plaintiff was delivered of a male child, Daniel Richard Cornmesser, on March 4, 1961.

At the close of the trial, the plaintiff should have asked leave of court to amend the complaint to conform it to the proof. This procedure was necessary to sustain the proceeding, but the plaintiff failed to act.

6. The verdict is fatally defective.

A verdict must be responsive to the issues raised by the pleadings and the evidence.

Here, the complaint does not state that a child was born out of wedlock, nor set forth the name of the child.

The verdict returned by the jury is, as follows:

We, the Jury, find the defendant, Robert Laken, is the real father of said child born out of wedlock to the said Joan Cornmesser, an unmarried woman.

In a paternity proceeding, the verdict must set forth the name of the child. The words, said child, are not sufficient to identify the child. The verdict is not aided by the complaint because as heretofore shown, it also is defective.

In addition, the record discloses that the plaintiff had two children. (Abst. 20.) The trial court could not legally

enter judgment that the defendant is the father of the child, Daniel Richard Cornmesser, and it did not in fact do so.

A verdict which finds that the defendant is the father of a child born out of wedlock, which relief is not sought by the pleadings, is not responsive to the issues.

The trial court should have set aside the verdict and granted the defendant a new trial.

Clearly, the verdict is void. So viewed, the purported judgment in this case cannot stand.

7. The trial court did not enter judgment that the defendant is the father of the child.

The Paternity Act, in part, provides:

> "• • • if on the trial of the issue by the court or jury, as the case may be, finds that he is the father, the court shall enter judgment to that effect • • •"
>
> Ill. Rev. Stat. 1959, Chap. 106¾, Par. 59.

The Civil Practice Act, in part, provides:

> "Promptly upon the return of a verdict, the court shall enter judgment thereon."
>
> Ill. Rev. Stat. 1961, Chap. 110, Par. 68 (2).

The statute is mandatory. The trial court must enter judgment promptly upon the return of the verdict.

As shown in *Di Bella* v. *Cuccio*, 15 Ill. 2d 580, 582, the trial court entered judgment "finding the defendant to be the father of the child." It acted in compliance with the provision of the statute, as the trial court should have done in this case.

Here, judgment was not entered. The trial court failed to comply with the statute.

In the motion to vacate, it was pointed out to the trial court that it had not entered judgment. The trial court had an opportunity to amend the record, but it did not do so. The failure to enter judgment is not the fault of the defendant.

Due process of law was violated.

8. The evidence is insufficient to sustain the verdict.

In a paternity proceeding, it is incumbent on the plaintiff to prove her case by a preponderance of the evidence. (*People ex rel. Wilson* v. *Cutler*, 200 Ill. App. 469.)

Little more than a suspicion of guilt is raised by the evidence in this case.

Here, the plaintiff testified that the defendant had sexual intercourse with her on May 22, 1960. (Abst. 18.) All other claims of sexual intercourse with the defendant are vague, general and indefinite. She had had her last menstrual period on May 8, 1960. It lasted five days.

The defendant testified that he had sexual intercourse with the plaintiff the last of April. (Abst. 32.) He denied that he had sexual intercourse with her on May 22, 1960.

An accused is entitled to introduce evidence of his good character, as was done in this case. It is not to be disregarded, but is entitled to much weight and should be received in cases of doubt. (*People ex rel. Collins* v. *Matt*, 224 Ill. App. 210.)

Here, the plaintiff has not proved her case by a preponderance of the evidence because her evidence is counterbalanced by equally credible evidence of the defendant. (*McFarland* v. *People*, 72 Ill. 368.)

Clearly, the verdict is against the manifest weight of the evidence. (*Ford* v. *Narup*, 38 Ill. App. 2d 245, *People ex rel. Kominsky* v. *Engert*, 202 Ill. App. 299, *People ex rel. Wilson* v. *Cutler*, 200 Ill. App. 469; *People ex rel. Zimmerman* v. *Rhoede*, 198 Ill. App. 537, *People ex rel. Jorczik* v. *Garines*, 198 Ill. App. 435, *People ex rel. Murphy* v. *Frowley*, 185 Ill. App. 338, *People ex rel. O'Connell* v. *Nason*, 161 Ill. App. 29.)

9. The defendant did not have a fair trial by an impartial jury.

As heretofore shown, a paternity proceeding is an action to establish, among other things, the paternity of a child born out of wedlock. It is the prime objective of the Paternity Act. The paternity of the child must first be established before the court may establish and enforce liability for its support, maintenance, education and welfare, and for maternity expenses.

Here, it is not sought by the proceeding to establish the paternity of a child. There is no specific prayer for such relief in the complaint. As a result thereof, the trial court had no right to submit an issue whether the person charged is the father of the child, to be tried by a jury.

The record discloses that the trial court did not cause an issue to be made up as provided by the Paternity Act. Therefore, the jury did not have a right to find that the defendant was "the real father of said child."

The trial court should have directed a verdict for the defendant. It was not established that he was the father of the child. His motion for a directed verdict should have been granted.

The denial of a fair trial violates the 14th Amendment to the Constitution of the United States.

10. The trial court was without jurisdiction to enter the order of support.

The Paternity Act, in part, provides:

> "• • • if on the trial of the issue the court or jury, as the case may be, finds that he is the father, the court shall enter judgment to that effect. If such judgment is entered the court shall take evidence upon the requirements of the child for its support, maintenance, education and welfare, and upon the expenses of the mother during pregnancy, confinement and recovery, and shall enter an order thereof." • • •
>
> "In determining the amount of support and confinement expenses to be charged to the father, the court shall take into account not only his financial condition and circumstances but also the income and resources of the mother which are or may be available for the support of the child." • • •
>
> Ill. Rev. Stat. 1959, Chap. 106¾, Par. 59.

The statute requires, as a basis for an order of support, a judgment that the defendant is the father of the child. (*Mowery* v. *Karas*, 35 Ill. App. 2d 406, 183 N.E. 2d 35.)

As heretofore shown, the record discloses that judgment was not entered. If judgment is not entered, the trial court does not have any power or authority to take such evidence and enter an order.

The order of support is void.

11. There is no evidence to sustain the order of support.

The record discloses that the trial court did not take evidence upon the requirements of the child for its support, maintenance, education and welfare, or upon the expenses of the mother during pregnancy, confinement and recovery. If it had, the testimony and the rulings of the trial judge would have been included in the report of proceedings.

Although the order recites, this matter having been heard, it does not mean that any testimony was heard by the trial court, nor can it be presumed that there was a hearing.

The trial court should have followed the provisions of the statute, but it failed to do so. The want of evidence is fatal to the order of support. It is reversible error.

Conclusion.

This case involves substantial federal questions. The court below has decided them in a way not heretofore decided by this court or in a way not in accord with the applicable decisions of this court.

The practice and procedure is the most defective that appears in the decisions in Illinois. There is not a single case which supports the decision of the court below. It sets a bad precedent.

There has been a substantial denial of the constitutional rights of the petitioner. The accused did not have a fair trial by an impartial jury. It is the greatest human right that an accused has. Illinois has deprived him of his liberty and property without due process of law in violation of the Constitutions of the United States and of the State of Illinois. It also has denied him the equal protection of the laws.

In order that justice may be done, this court should take jurisdiction. It is the last hope of the petitioner.

For the reasons stated, this petition for writ of certiorari should be granted.

Respectfully submitted,

JOHN R. SNIVELY,

Counsel for Petitioner.

APPENDIX

A.

Statute.

An Act in relation to the paternity of children born out of wedlock, to provide for the liability of the parents of such children, and to repeal an Act herein named. Approved July 5, 1957. L. 1957, p. 1035.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

51. Definitions.) Section 1. For the purposes of this Act a "child born out of wedlock" is a child whose parents were not married to each other at the time of its birth; provided that a child shall not be considered as born out of wedlock if its parents were married at the time of its conception but divorced at the time of its birth, or if after the conception or birth of the child, the marriage of its parents is declared void for any reason. The definition of legitimacy or illegitimacy for other purposes shall not be affected by this Act.

52. Liability of father and mother to child.) Section 2. The father of a child born out of wedlock whose paternity is established in a proceeding under this Act shall be liable for its support, maintenance, education and welfare, until the child's attainment of age 18 or until the child is legally adopted, to the same extent and in the same manner as the father of a child born in lawful wedlock is liable for its support, maintenance, education and welfare.

53. Liability of father for maternity expenses.) Section 3. A father whose paternity is so established shall also be

(Statute)

liable for the reasonable expenses of the mother during the period of her pregnancy, confinement and recovery, which liability may be determined and enforced in the proceeding in which paternity is established or in any subsequent proceeding to enforce liability for the support, maintenance, education and welfare of the child.

54. Institution of the action.) Section 4. A proceeding to establish the paternity of a child born out of wedlock and to establish and enforce liability for its support, maintenance, education and welfare may be instituted in a court having jurisdiction of cases coming within the terms of "An Act relating to children who are or may hereafter become dependent, neglected or delinquent, to define these terms, and to provide for the treatment, control, maintenance, adoption and guardianship of the persons of such children, and to give to the courts having jurisdiction of cases coming within this Act, jurisdiction to proceed with the prosecution and punishment of persons contributing to the dependency, neglect or delinquency of children", approved April 21, 1899, as amended. All other courts of record having jurisdiction of actions to establish the paternity of children bron out of wedlock may also hear and determine such proceedings in the manner provided by this Act.

Such action may be instituted only on the filing of a complaint in writing by the mother of a child born out of wedlock, or by a woman who is pregnant with child, which, if born alive, may be born out of wedlock, accusing, under oath or affirmation, a person with being the father of such child. The action may be filed in the county where the complainant may be so pregnant or delivered, or where the person accused may reside or be found. No such action may be

(Statute)

brought after the expiration of two years from the birth of the child; provided, that where the person accused has acknowledged in open court the paternity of the child, prosecution may be brought at any time within two years from the last time such acknowledgment was made; and, provided further, that the time any person so accused is absent from the State shall not be computed.

55. Arrest-Examination-Bond.) Section 5. Upon the filing of a complaint as provided in Section 4, under oath or affirmation before the Court, the Court shall thereupon issue a warrant for the apprehension of the defendant, which warrant shall be directed to all sheriffs, coroners, constables and other police officers in the State, and which may be served by any such officer in any county. Upon the appearance of the accused and in his presence, the Court shall examine the woman, upon oath or affirmation, on the charge that he is the father of the child. The accused shall have the right to controvert the charge, and evidence may be heard as in other cases within the jurisdiction of the Court. If the Court is of the opinion that no sufficient cause is established it shall dismiss the complaint and discharge the accused. The accused shall have the right to submit to a blood test. If the accused so submits himself, the court shall order such test administered. If the blood test shows that the accused is not the father of the child as alleged in the complaint, the accused shall be discharged forthwith by the court. If the accused admits the charge, or waives examination of the complainant, or if after the accused has controverted the charge the court, upon examination, determines that sufficient cause appears, it shall bind the accused person, in bond, with sufficient security, to appear in court on a designated return day occurring within 30 days from the date of the bond, or as soon there-

after as the court is in session, and from day to day after the time so designated, until the final order or judgment of the court, to answer the charge and to abide the final order or judgment and not to depart without leave, to which court the bond shall be returned. In neglect or refusal to give bond and a security, the court shall commit the accused to the county jail, there to be held to answer the complaint. This Amendatory Act of 1959 shall not affect in any way actions commenced prior to the effective date of this Act. As amended by act approved July 15, 1959. L. 1959, p. 1045.

56. Trial by jury-Mother and accused to be competent witnesses.) Section 6. At the time appointed for appearance and answer, the court shall cause an issue to be made up whether the person charged is the father of the child, which issue, upon demand of either the mother or the accused person, shall be tried by a jury. In the trial of issue, the mother and the defendant shall be competent witnesses and their credibility shall be left to the court or jury as the case may be.

57. Inability of woman to attend trial-Continuance-Bond.) Section 7. If at the time appointed for appearance and answer the woman be not delivered, or is unable to attend, the court shall continue the cause for such time as appears necessary, and shall order a bond, in such amount and with such sureties as the court may deem just, for the appearance of the defendant at the day to which the cause is continued, which bond shall be further conditioned in the same manner as the bond provided for in Section 5. On neglect or refusal to give the bond and security, the defendant shall be committed to the county jail, there to be held for the trial of the cause. If the mother has not

been delivered or is unable to attend at the day to which the cause is continued, the court shall order further continuances as may be required from time to time and shall on each occasion continue the bond.

58. Discharge of defendant-Mother to pay costs.) Section 5. If upon the trial of the issue of paternity, the court or jury, as the case may be, finds that the defendant is not the father of the child, the judgment of the court shall be that the defendant be discharged. The mother shall pay the costs of the prosecution and judgment shall be entered therefor upon which execution may issue.

59. Judgment-Court to retain jurisdiction-Determination of amount of support-Death of father.) Section. 9. If the defendant has in writing acknowledged that he is the father of the child, either at the preliminary hearing provided in Section 5, or at the subsequent trial of the issue, which acknowledgment he has not repudiated at the trial of the issue, or if on the trial of the issue the court or jury, as the case may be finds that he is the father, the court shall enter judgment to that effect. If such judgment is entered the court shall take evidence upon the requirements of the child for its support, maintenance, education and welfare, and upon the expenses of the mother during pregnancy, confinement and recovery, and shall enter an order thereof. The order may be directed to the father, or mother, or both. The court shall retain jurisdiction of the cause and may, upon proper prior written notice of the hearing to the parties in interest, make new or supplementary orders for the support, maintenance, education and welfare of the child as from time to time the court deems necessary, upon petition of the mother, the father, any interested person who has contributed to the support, maintenance, edu-

(Statute)

cation and welfare of the child or assumed its support, maintenance, education and welfare, or any governmental agency interested in the support, maintenance, education and welfare of the cihld. Pending the initial determination of the support order, the court may make provision for bond and security to assure jurisdiction over the person of the defendant, and for the enforcement thereof by commitment of the defendant, in the manner provided in either Section 5 or 7 of this Act.

In determining the amount of support and confinement expenses to be charged to the father, the court shall take into account not only his financial condition and circumstances but also the income and resources of the mother which are or may be available for the support of the child. The court shall direct payment of the support to the mother, or to a person or agency designated by the court, as the welfare of the child requires.

Where the father of such child shall die after the adjudication that he is the father of the child and the entry of an order for support and confinement expenses, such unpaid amounts as to support and confinement expenses as shall have accrued at the date of the death of the father shall be a provable claim against his estate.

60. Bond of defendant-Enforcement.) Section 10. If any order entered to Section 9 providing for the care and support of a child and the confinement expenses of the mother, the court shall require the defendant to enter into a bond with at least one good and sufficient surety to be approved by the court, or without sureties if none can be obtained, in such amount as the court shall determine, conditioned upon compliance with the terms of the order pertaining to child care and support and the confinement expenses of the mother.

(Statute)

The court may from time to time require the execution of new bonds as may be necessary to assure compliance with the order of child care and support and of the confinement expenses of the mother, or any modification thereof, or to make necessary adjustments occasioned by changed circumstances of the parties.

The bond shall be payable to the People of the State of Illinois and shall be filed with and preserved by the clerk of the court. A refusal to enter into the bond ordered by the court, or a wilful refusal to comply with the terms of the order of child care and support and of the confinement expenses of the mother may be adjudged a contempt of court and punished accordingly, but no child care or support and confinement expenses of the mother shall accrue during the period in which a party is imprisoned for such contempt.

Whenever default occurs in the payment of any amount due for child care and support and the confinement expenses of the mother, the state's attorney, upon request of any person or governmental agency having an interest in the support of the child shall, or upon his own initiative may, institute a proceeding in the court in which the bond is filed for the issuance of a citation to the principal and sureties, if any, on the bond. The court shall issue the citation requiring the principal and sureties to appear on the date designated therein, to show cause why execution should not issue against them for the amount in default. The citation shall be served upon the principal and sureties as in the case of other civil process. If the amount due has not been paid on or prior to the date for showing cause, the court shall render judgment in favor of the People of the State of Illinois, against the principal and sureties who have

(Statute)

been served with the citation for the amount unpaid and the costs of the proceeding; and execution shall issue thereon as in the case of judgments in other civil actions against the property of such principal and sureties to the sheriff of any county where they or any of them reside or have property subject to such execution. The proceeds of any sale upon execution, after deduction and payment to the county treasurer of the costs incurred by the county, shall be paid to the clerk of the court in which the child care and support order was entered, and shall by him be disbursed in accordance with such order.

The rendition and collection of judgment, as aforesaid, shall not discharge the prinicpal and sureties in the bond in respect to future liability for child support and confinement expenses of the mother and shall not be a bar to the taking of similar proceedings for the collection of child support and confinement expenses of the mother becoming due and remaining payable.

61. Child to be deemed a "dependent child".) Section 11. Upon the filing of a complaint under this Act, the child involved therein shall be deemed a "dependent child" within the meaning of Section 1 of "An Act relating to children who are or may hereafter become dependent, neglected or delinquent, to define these terms, and to provide for the treatment, control, maintenance, adoption and guardianship of the person of such children, and to give to the courts having jurisdiction of cases coming within this Act, jurisdiction to proceed with the prosecution and punishment of persons contributing to the dependency, neglect or delinquency of children", approved April 21, 1899, as amended.

The court may in such action to determine paternity and liability for support provide for the guardianship of such

child in the mother or in any other person or institution authorized by said Act.

62. Custody of child.) Section 12. A person charged or alleged to be the father of a child born out of wedlock, whether or not adjudicated the father under this Act, shall have no right to the custody or control of the child except such custody as may be granted pursuant to an adoption proceeding initiated by him for that purpose.

63. Death of child-Bonds to become void.) Section 13. If the child involved in the complaint filed under this Act should not be born alive, or being born alive should thereafter die or be legally adopted, any bond executed hereunder shall become void; provided however, that if the child dies after an adjudication that the accused is the father and after an order is entered pursuant to Section 9, the liability of the father as to payments after the death shall cease but he shall remain liable for all sums accrued and unpaid at the death of the child and for the purpose of enforcement of these arrearages the bond shall remain in full force and effect. If the mother and the person alleged to be the father should intermarry at any time after the conception or birth of the child, the child shall in all respects be deemed and held legitimate and any bond executed hereunder shall likewise be deemed void, and any proceedings hereunder shall abate.

64. Application of Civil Practice Act-Pleadings.) Section 14. The provisions of the Civil Practice Act and all existing and future amendments of said Act and modifications thereof, and the rules now or hereafter adopted pursuant to said Act, shall apply to all proceedings hereunder except as otherwise specifically provided in this Act.

(Statute)

No matters not germane to the purpose of a proceeding under this Act shall be introduced by answer, joinder, counterclaim or otherwise.

65. Repeal-Saving Clause.) Section 15. The following Act is repealed: "An Act concerning bastardy", approved April 3, 1872, as amended.

The repeal of said Act shall not affect rights or liabilities which have accrued thereunder and which have been determined, settled or adjudicated prior to the effective date of this Act or which are the subject of proceedings pending thereunder on such effective date. No such pending proceedings shall abate, but on the contrary such proceedings shall be continued under the provisions of the Act herein repealed for which purpose said Act shall be deemed to remain in full force and effect.

66. Title of act.) Section 16. This Act shall be known and may be cited as the "Paternity Act."

Ill. Rev. Stat. 1959, Chap. 106¾, Sec. 1 et seq.

B.

Opinion of the Appellate Court of Illinois

Second District, Second Division
October 14, 1963
Rehearing Denied November 5, 1963.
43 Ill. App. 2d 324, 193 N.E. 2d 337.

SPIVEY, J.

This appeal involves a case under the Paternity Act wherein by a jury verdict the defendant was found to be the father of a child born to the plaintiff, out of wedlock.

The appeal was originally lodged in the Supreme Court on the theory that a constitutional question was therein involved and was by that court transferred here without opinion.

Plaintiff's complaint was filed in the County Court of Winnebago County. The defendant appeared in open court with his counsel pursuant to the usual warrant. He was furnished a copy of the complaint, entered a plea of not guilty and was admitted to bail.

Subsequently there was a trial by jury at which time defendant was present and represented by counsel.

The jury returned a verdict in words as follows, "We the Jury, find the defendant, Robert Laken, is the real father of said child born out of wedlock of the said Joan Cornmesser, an unmarried woman."

Post trial motions were overruled and the Court then entered the following order,

"This matter having been heard on this 26th day of October, 1961, and the above named defendant having been found to be the father of Daniel Cornmesser, a child born out of wedlock on March 4, 1961, before the Honorable

(Appellate Court Opinion)

Fred J. Kullberg, Judge of the County Court of Winnebago County, Illinois. The Court enters the following order:

"It is thereby ordered that the defendant is liable to the child for his support, maintenance, education and welfare. The defendant shall pay to the Clerk of the County Court of Winnebago County, Illinois Twelve and 50/100 Dollars ($12.50) per week commencing October 26, 1961 for the liability set forth above. These payments are to be made so long as liability for such child continues under the terms and provisions of the 'Paternity Act'."

Defendant's motion to vacate the judgment and order of support of October 26, 1961 was by the court denied on February 24, 1961.

In addition to the constitutional question, defendant assigns numerous grounds for reversal. Except for one citation (not in point) not a single authority is cited in defendant's brief and argument other than the statutory provisions which were not set out in his brief as required by Rule 7 of this Court.

The Paternity Act adopted in 1957, Chap. 106¾, Sects. 1 et-seq., Ill. Rev. Stat. 1961, superseded the Act concerning bastardy, Chap. 17, Ill. Rev. Stat. The prime purpose of both of these acts is the same, namely, to determine the putative father and to provide support for the illegitimate child so as to prevent said child becoming a public charge.

The proceedings under the Paternity Act are civil in nature and are governed by the provisions of the Civil Practice Act except as otherwise specifically provided in the Paternity Act. (Chap. 106¾, Sect. 64, Ill. Rev. Stat. 1961.)

(Appellate Court Opinion)

Defendant contends the complaint was defective in that it did not contain a specific prayer that the court establish the paternity of the child and that the complaint should have been amended to recite that the child had been born out of wedlock instead of a recitation that the plaintiff was pregnant with child fathered by the defendant.

Any objection to the complaint if one existed was cured by verdict (*Mooney* v. *People*, 96 Ill. App. 622) and waived by proceeding to trial without objection. (*People* v. *Suhling*, 231 Ill. App. 256; *People* v. *Anders*, 173 Ill. App. 561; *People* v. *Humbract*, 215 Ill. App. 29.)

It is said that the Court did not follow the procedures specified in Section 5 of the Paternity Act, Chap. 106¾, Sect. 58, Ill. Rev. Stat. 1961. Defendant's brief points out only one specific error, namely, that his plea of not guilty was irregular and did not form a proper issue. Under the prior act a plea of not guilty presented a sufficient issue even though not as formal as might be. (*People* v. *Woodrich*, 72 Ill. 407, and *People* v. *Humbract*, 215 Ill. App. 29.) In as much as the Civil Practice Act is applicable to the instant proceeding, it would have been more appropriate for the issues to have been drawn by defendant filing an answer or other pleading. He cannot now complain of his failure to provide a more formal issue. We will not search the record to determine if any other proper procedures have not been followed. It is counsel's duty to point them out to us if any exist. In any event defendant would have waived any irregularity in the preliminary proceedings by having failed to object before trial.

It is further argued that the court failed to cause an issue to be made up as to whether the defendant is the father of the child as provided by Section 6 of the Paternity Act.

(Appellate Court Opinion)

A similarly worded section under the former act was held to be directory and not mandatory. (*People* v. *Humbract*, 215 Ill. App. 29.) However in the instant case it cannot be said that the jury was not informed of the issue in that the Court gave the following instruction tendered by the defendant, "The plaintiff may establish paternity of the child Daniel Cornmesser against the defendant Robert Laken, if she proves as against said defendant, by the greater weight of the evidence and under the instructions of the Court each and all of the following elements: 1. That said Joan Cornmesser was on March 4, 1961 the date of birth of Daniel Cornmesser, an unmarried woman. 2. That a male child Daniel Cornmesser was born to her on March 4, 1961. 3. That said Daniel Cornmesser was a 'child born out of wedlock.' 4. That said child is now living. 5. That the defendant Robert Laken is the father of the child. 6. That said child has not been legally adopted. If the plaintiff fails to prove any of the foregoing elements by a greater weight of the evidence, she cannot establish paternity."

Defendant's further argument of a material variance between the allegations of the complaint and the proof cannot prevail. His post trial motions for a new trial and to vacate the judgment allege variations in general terms and did not suggest any specific variation. A general allegation of variance will not preserve the question for consideration. (*Gascoigne* v. *The Metropolitan West Side Elevated Railway Company*, 239 Ill. 18, 87 N.E. 883.)

Defendant contends he did not have a fair trial before an impartial jury. On this point it is sufficient to say that his argument in no manner approaches the point made.

(Appellate Court Opinion)

It is suggested the verdict is defective in having failed to name the child alleged to have been sired by the defendant. A verdict with like omission was held to be sufficient in *Curran* v. *People*, 35 Ill. App. 275, which followed the case of *Davis* v. *People*, 50 Ill. 199. In our opinion the verdict is sufficiently responsive to the pleadings and under the instructions of the Court to determine the identity of the child.

It is argued that the Court did not enter a proper judgment contemplated by Section 9 of the Paternity Act. No particular form of judgment order is prescribed by the statute. The judgment on the verdict recited that the jury's verdict found the defendant to be the father of Daniel Cornmesser. It further ordered the only remaining thing to be done, that is, the fixing of payments the defendant was liable to make for the support, maintenance, education and welfare of the child he was found to be the father of. We find the judgment to be responsive to the verdict under the issues and is substantial compliance with the statute.

Error is assigned to the support order. It is argued that it is not supported by a proper judgment and that no evidence was heard touching upon the child's requirements nor the financial condition of the father.

Having already held the judgment proper we consider only the question of the evidence requirements.

The order having recited that the matter having been "heard", this assigned error is without merit.

It was said in *Anthony* v. *Gilbrath*, 396 Ill. 125, 71 N.E. 2d 84, "The word 'hearing' is a familiar term and is gen-

erally understood as meaning a judicial examination of the issues between the parties, whether of law or fact. *Glennon* v. *Britton*, 155 Ill. 232."

The Court in that case used particularly appropriate language when it said, "In view of this recital in the order allowing attorney's fees to appellant for services rendered on the 'hearing' it cannot be assumed that there was no such hearing. From this order it definitely appears that there was a hearing of some kind. The record itself cannot be disputed or diregarded. If there was such a hearing, and from the record we must conclusively presume there was, then the burden was on the appellant to show what transpired in the hearing by preserving a report of proceedings and making it a part of the record on appeal." To like effect: *Matthews* v. *Weiss*, 15 Ill. App. 2d 530, 146 N.E. 2d 809.

Lastly, defendant argues that the plaintiff failed to prove her case by a preponderance of the evidence. No useful purpose will be fulfilled by a recital of the testimony. Suffice to say is that the evidence offered on behalf of the plaintiff was adequate to sustain the jury verdict over the evidence on behalf of the defendant to the contrary.

The judgment of the County Court of Winnebago County is affirmed.

Affirmed.

CROW, P. J. and WRIGHT, J. concur.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
NOV 5 1964
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 129

ROBERT LAKEN,

Petitioner,

vs.

JOAN CORNELISSER,

Respondent.

Petition for Rehearing

JOHN R. SHIVELY,
401 West State Street,
Rockford, Illinois,
Counsel for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 129

ROBERT LAKEN,

Petitioner,

vs.

JOAN CORNMESSER,

Respondent.

Petition for Rehearing

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Robert Laken, prays that this Court grant a rehearing of its order of October 12, 1964, denying the petition for writ of certiorari, and that a writ of certiorari issue to review a judgment of the Appellate Court of Illinois, Second District, affirming a judgment of the County Court of Winnebago County in the above entitled case as prayed in the petition filed on May 29, 1964, herein.

Statement of the Case.

This is a civil action.

The complaint which was filed in the Circuit Court of Winnebago County is based upon the Illinois Paternity Act.

In the complaint the plaintiff, Joan Cornmesser, states, among other things, that "the said Plaintiff is now pregnant with a child in the County of Winnebago, State of Illinois, which, if born alive, may be deemed by law 'a child born out of wedlock' and that said child was fathered by the Defendant, Robert Laken."

In the prayer for relief she prays, among other things, that "the said Defendant be ordered and decreed to pay sufficient sums of money for the Plaintiff's expenses incurred by her pregnancy, confinement and recovery and for the said child's support, maintenance, education and welfare," and that the court issue forthwith a warrant for the arrest of the defendant. There is, however, no prayer that the paternity of the child may be established which prayer is absolutely necessary.

A warrant was issued. The defendant was arrested. He was required to give bond.

The case was submitted to a jury.

The verdict is, as follows:

We, the Jury, find the defendant, Robert Laken, is the real father of said child born out of wedlock of the said Joan Cornmesser, an unmarried woman.

The record shows that she has two children.

The trial court did not enter judgment on the verdict, but entered an order of support.

The defendant appealed.

Questions Not Previously Presented.

Whether a State statute which authorizes the issuance of a warrant, the arrest of the accused, and his imprisonment until the examination of the complainant in his presence, in a civil action, violates the 14th Amendment to the Constitution of the United States.

Whether the State deprived the petitioner of his property in violation of the 14th Amendment to the Constitution of the United States because the amount of support was fixed without further hearing.

Civil Actions.

The constitutional guaranty of due process of law does not require that parties shall be entitled to any particular form of action or method of procedure for the protection of rights and the redress of wrongs. It does, however, require that the substance of property rights be preserved, that the courts accord the parties due process in determining adjective and substantive law, and that some adequate and appropriate remedy be afforded for the vindication of personal and property rights. It also requires that such remedy shall be by a regular and orderly mode of procedure by due course of law, that relief be afforded in a court of competent jurisdiction, and that the defendant shall have notice, and an opportunity to be heard in his defense. Such essentials constitute the basic requisites of due process of law.

No particular form of process or notice is necessary to constitute due process of law. It does not, however, authorize the issuance of a warrant and the arrest of the accused in a civil action.

This is the only civil action which authorizes the issuance of a warrant, the arrest of the accused, and his imprisonment until the examination of the complainant in his presence. The court may then bind the accused person in bond, with sufficient security, to appear in court. In neglect or refusal to give bond and security, the court shall commit the accused to the county jail, there to be held to answer the complaint.

These provisions are malicious. They violate the 14th Amendment to the Constitution of the United States. They are unconstitutional. They should be so declared by the court.

Hearing.

In a paternity proceeding a party, upon demand is entitled to a trial by jury. The court shall cause an issue to be made up whether the person charged is the father of the child.

On the trial, the jury found the defendant "is the real father of said child," but the trial court did not enter judgment on the verdict.

The Paternity Act provides that if such judgment is entered the court shall take evidence upon the requirements of the child for its support, maintenance, education and welfare, and upon the expenses of the mother during pregnancy, confinement and recovery.

In determining the amount of support and confinement expenses to be charged the father, the court shall take into account not only his financial condition and circumstances, but also the income and resources of the mother which are or may be available for the support of the child.

The record shows that the trial court without further hearing fixed the amount of support. Evidence of the

amount needed for support must be presented before a determination of the amount of support is made. The trial court should not fix such amount arbitrarily, but upon evidence. The defendant was deprived of his property without due process of law.

Conclusion.

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that a rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Appellate Court of Illinois, Second District.

Respectfully submitted,

JOHN R. SNIVELY,
Counsel for Petitioner.

Certificate of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58(2) of this Court.

JOHN R. SNIVELY,
Counsel for Petitioner.